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Court of Appeals
Division III
State of Washington

No. 29913-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TEODORO MONCADA,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction of intimidating a public servant.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Mr. Moncada's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of intimidating a public servant?

C. STATEMENT OF THE CASE

Teodoro Moncada worked as a construction superintendent and/or foreman for 22 years before being deployed to Iraq with his Army National Guard unit. When he returned from Iraq he was unable to find employment. 3/31/11 RP 52-53. On the morning of July 14, 2010, Moncada left his house to follow up on some possible leads for employment that his wife had told him about. When none of these leads panned out he drove to a gas station, bought some beer and began drinking. 3/31/11 RP 53-54. By early afternoon, he was drinking whisky and beer at the Sand Bar in Moses Lake WA. 3/31/11 RP 54-55.

Sometime later that afternoon Moncada called his friend he knew in the military, Ryan Merritt, and convinced Merritt to join him at the

Sand Bar. When Merritt arrived he noticed Moncada was drinking heavily and quite intoxicated. 3/31/11 RP 41-42. Eventually, Merritt convinced Moncada to leave his car keys with the bartender and accompany Merritt to Merritt's house to barbeque some ribs. Moncada had not eaten anything all day. 3/31/11 RP 43. After starting his grill, Merritt went inside to prepare the ribs while Moncada remained sitting in a chair in Merritt's backyard. When Merritt returned, Moncada was gone. Merritt's backyard fence is about 200 yards from I-90. 3/31/11 RP 44-45.

Around 7:00 p.m., Trooper Bassen saw Mr. Moncada walking along the right shoulder of the freeway in the eastbound lane either hitchhiking or making obscene gestures at passing motorists. Trooper Bassen was westbound so he had to take the next exit and head back in the eastbound lanes to check out Moncada. 3/30/11 RP 41-43. Bassen stopped his patrol car 25 feet behind Moncada, who was now walking along the inside shoulder of the freeway, and got out of his car. 3/30/11 RP 43-44.

Moncada saw Bassen and began walking toward him in a tense manner with clenched fists. Bassen ordered Moncada to stop several times but Moncada kept coming toward him saying, "What the fuck do you want?" 3/30/11 RP 44-45. Trooper Bassen asked Moncada what he was

doing on the freeway. Moncada replied, “Fuck you. What the fuck are you going to do, shoot me?” Trooper Bassen then pulled out his taser and aimed it at Moncada. 3/30/11 RP 46. Moncada said, “Fucking shoot me.” Trooper Bassen told Moncada to put up his hands. Moncada did not comply. He said, “Tase me or I will fucking kill you . . .I’m going to rip your fucking head off.” 3/30/11 RP 48-49. Moncada took another step, Trooper Bassen tased him, and Moncada fell onto the asphalt on his back. 3/30/11 RP 49-50.

Shortly thereafter, Trooper Raymond arrived at the scene. He and Bassen handcuffed Moncada and took him into custody. Moncada gave more “Fuck you” responses to Trooper Raymond’s questions and said, “Take these cuffs off and I’ll knock you in the fucking mouth.” Both troopers noticed Moncada was obviously very intoxicated. Trooper Raymond testified he had no fear for his safety. 3/30/11 RP 49-52; 3/30/11 RP 9-16. After Moncada had been secured in Bassen’s patrol car and was being transported to jail, he continued the obscenities and threatened to kill Trooper Bassen as well as Bassen’s family. Bassen testified he believed the threats were credible. 3/30/11 RP 54-57.

Mr. Moncada testified he did not remember leaving Merritt’s house, being on the freeway, making any threats or having any

conversations with the troopers. He did remember being tasered. 3/31/11 RP55-57.

At trial, Moncada brought a halftime motion after the State rested to dismiss the charge of intimidating a public servant. Citing *State v. Montano*, 169 Wn.2d 872, 876, 239 P.3d 360 (2010), he argued there was insufficient evidence that he intended his threats to influence any official action by the troopers. 3/31/11 RP 19-20. The Court held the “attempt to influence” element of the charge was satisfied only by the statement, “Tase me or I will fucking kill you.” 3/31/11 RP 25.

The jury convicted Mr. Moncada of intimidating a public servant. CP 84. This appeal followed. CP 109.

D. ARGUMENT

Mr. Moncada’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of intimidating a public servant.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488,

670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d

628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

A person commits the crime of intimidating a public servant if, "by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant." RCW 9A.76.180. In order to establish a prima facie case, the State must provide some evidence

both that the defendant made a threat and that the threat was made with the purpose of influencing a public servant's official action. *State v. Montano*, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). It is undisputed in the present case that Mr. Moncada's statements to the troopers constituted threats.

The issue is whether sufficient evidence existed that Mr. Moncada intended his threats to influence an official action by the troopers.

In *State v. Burke*, 132 Wn.App. 415, 132 P.3d 1095 (2006), the defendant was convicted of intimidating a public servant after he yelled profanities and "fighting threats" at a police officer during a house party, as well as "belly bumping" the officer and swinging his fists. *Burke*, 132 Wn.App. at 417-18, 132 P.3d 1095. The police officer had observed several, apparently underage people drinking beer in front of the house, and he followed them through the house onto the back porch, where he was accosted by the defendant. On appeal, the court reasoned that the evidence did not support a jury's inference that the defendant intended to influence the police officer's official actions. Though the defendant's actions demonstrated his anger at the situation and at the officer, those actions--by themselves--did not evidence an attempt to influence an action by the officer. The court reversed the conviction, holding that "[e]vidence

of anger alone is insufficient to establish intent to influence [a public servant's] behavior." *Burke*, 132 Wn.App. at 422, 132 P.3d 1095.

This rule from *Burke* is consistent with statements in another case addressing the public servant intimidation statute, *State v. Stephenson*, 89 Wn.App. 794, 807, 950 P.2d 38 (1998) (holding that the intimidation statute is not unconstitutionally overbroad). In that case, the court observed that the "attempt to influence" element of the crime cannot be satisfied by threats alone. *Stephenson*, 89 Wn.App. at 807, 950 P.2d 38. Thus, the two courts agreed that to convict a person of intimidating a public servant, there must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances. *Montano*, 169 Wn.2d at 87y, 239 P.3d 360.

In *Montano*, our Supreme Court agreed with and adopted this rule. *Id.* The facts in *Montano* are remarkably similar to the present case. A police officer, Smith, saw Montano shove his brother. The officer stopped to investigate. The officer asked Montano for identification but Montano had none with him. When the officer asked Montano for his name, Montano refused to provide it. As the officer attempted to verify Montano's identity, Montano became agitated and began to walk away. The officer grabbed the back of Montano's coat to restrain him, but

Montano pulled away. The officer took hold of the coat again and Montano again pulled away. The officer then gripped Montano's wrist and informed him that he was under arrest. Montano broke free, grabbed the officer's wrist, and attempted to pull him over. During this exchange, another officer, Jones, arrived at the scene. Because of Montano's continued resistance, Officer Smith asked Sergeant Jones to deploy his Taser. After Sergeant Jones twice warned Montano to stop resisting, and when Montano failed to comply and approached Jones, Jones tased Montano. Despite the shock, Montano continued to struggle and Jones tased him again. When Montano stopped struggling, Officer Smith handcuffed him and led him to the patrol car. Montano again became angry, pulled away from Smith, and told the officer, "I know when you get off work, and I will be waiting for you." As they walked toward the car, Montano continued to verbally abuse Officer Smith, saying, "I'll kick your ass," "I know you are afraid, I can see it in your eyes," and calling the officer "punk ass." While Officer Smith drove Montano to the Grant County jail, Montano continued his commentary, noting that "you need to retire. I see your gray hair." Montano repeated that the officer was scared and that he could see it in Smith's eyes. *Montano*, 169 Wn.2d at 874-75, 239 P.3d 360.

The Court of Appeals distinguished *Montano* from *Burke* because the police officer was taking official action (transporting Montano to jail) at the time Montano made the threats, whereas in *Burke*, the officer had "abandoned his pursuit ... and was simply trying to leave the scene." *State v. Montano*, 147 Wn.App. 543, 548, 196 P.3d 732 (2008). However, the Supreme Court found there was no meaningful distinction between the facts of *Burke* and those in *Montano*. The Court held the *Burke* court's reasoning applied to the facts of Montano's case:

Before his arrest, Montano struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in two tasings, Montano grew increasingly enraged and violent. After being subdued physically, he resorted to lashing out verbally, hurling threats and insults at the officers. As in *Burke*, this behavior amply demonstrates Montano's anger at the situation and at the police officers.

Montano, 169 Wn.2d at 879, 239 P.3d 360.

Despite Montano's behavior, which was clearly more violent than that of Mr. Moncada in the present case, the Supreme Court found there was simply no evidence to suggest that Montano engaged in this behavior, or made his threats, for the purpose of influencing the police officers' actions. *Id.* Instead, the evidence showed a man who was angry at being detained and who expressed that anger toward the police officers. *Id.* In the absence of some evidence suggesting an attempt to influence, the State

failed to make a prima facie showing that Montano attempted to influence either officer's official action. Though such behavior is certainly reprehensible, it does not rise to the level of intimidation. *Id.*

The facts of the present case are indistinguishable from those in *Montano*. In fact, Montano's behavior, as well as Burke's, was more egregious toward the police officers than that of Mr. Moncada. Before his arrest, Montano struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in two tasings, Montano grew increasingly enraged and violent. *Montano*, 169 Wn.2d at 879, 239 P.3d 360. Burke "belly bumped" the officer and swung his fists. *Burke*, 132 Wn.App. at 417-18.

By contrast, Mr. Moncada only advanced toward Trooper Bassen making threats and using obscenities. There was simply no evidence to suggest that Mr. Moncada engaged in this behavior, or made his threats, for the purpose of influencing the police officers' actions. His statement, "Tase me or I will fucking kill you," did not constitute an attempt to influence either officer's official action, any more than did his (or Montano's and Burke's) other threats or insults. Instead, the evidence showed an intoxicated man who was angry at being detained and who

expressed that anger toward the police officers. Since the State failed to make a prima facie showing that Mr. Moncada attempted to influence either officer's official action, the evidence is insufficient to prove this essential element of the crime of intimidating a public servant beyond a reasonable doubt.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted February 14, 2012,

s/David N. Gasch, WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 14, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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